

# SUPREME COURT OF THE UNITED STATES.

No. 6.—OCTOBER TERM, 1925.

Thomas Agnello et al., Petitioners,	}	Writ of Certiorari to Circuit Court of Appeals, Second Circuit.
vs.		
United States of America.		

[October 12, 1925.]

Mr. Justice BUTLER delivered the opinion of the Court.

Thomas Agnello, Frank Agnello, Stephen Alba, Antonio Centorino and Thomas Pace were indicted in the District Court, Eastern District of New York, under § 37, Criminal Code, c. 321, 35 Stat. 1088, 1096, for a conspiracy to violate the Harrison Act, c. 1, 38 Stat. 785, as amended by §§ 1006, 1007, 1008 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1130. The indictment charges that defendants conspired together to sell cocaine without having registered with the Collector of Internal Revenue and without having paid the prescribed tax. The overt acts charged are that defendants had cocaine in their possession, solicited the sale of it, met in the home of defendant Alba at 138 Union Street, Brooklyn, and made arrangements for the purpose of selling it, brought a large quantity of it to that place, and sold it in violation of the Act. The jury found defendants guilty. Each was sentenced to serve two years in the penitentiary and to pay a fine of \$5,000. The Circuit Court of Appeals affirmed the judgment. 290 Fed. 671.

The evidence introduced by the government was sufficient to warrant a finding of the following facts: Pasquale Napolitano and Nunzio Dispenza, employed by government revenue agents for that purpose, went to the home of Alba, Saturday, January 14, 1922, and there offered to buy narcotics from Alba and Centorino. Alba gave them some samples. They arranged to come again on Monday following. They returned at the time agreed. Six revenue agents and a city policeman followed them and remained on watch outside. Alba left the house and returned with Centorino. They did not then produce any drug. After discussion and the refusal

of Napolitano and Dispenza to go to Centorino's house to get the drug, Centorino went to fetch it. He was followed by some of the agents. He first went to his own house, 172 Columbia Street; thence to 167 Columbia Street,—one part of which was a grocery store belonging to Pace and Thomas Agnello, and another part of which, connected with the grocery store, was the home of Frank Agnello and Pace. In a short time, Centorino, Pace and the Agnellos came out of the last mentioned place, and all went to Alba's house. Looking through the windows, those on watch saw Frank Agnello produce a number of small packages for delivery to Napolitano and saw the latter hand over money to Alba. Upon the apparent consummation of the sale, the agents rushed in and arrested all the defendants. They found some of the packages on the table where the transaction took place and found others in the pockets of Frank Agnello. All contained cocaine. On searching Alba, they found the money given him by Napolitano.

And as a part of its case in chief, the government offered testimony tending to show that, while some of the revenue agents were taking the defendants to the police station, the others and the city policeman went to the home of Centorino and searched it but did not find any narcotics; that they then went to 167 Columbia Street and searched it, and in Frank Agnello's bedroom found a can of cocaine which was produced and offered in evidence. The evidence was excluded on the ground that the search and seizure were made without a search warrant. In defense, Centorino and others gave testimony to the effect that the packages of cocaine which were brought to and seized in Alba's house at the time of the arrests had been furnished to Centorino by Dispenza to induce an apparent sale of cocaine to Napolitano, that is, to incite crime or acts having the appearance of crime for the purpose of entrapping and punishing defendants. Centorino testified that, after leaving Napolitano and Dispenza with Alba at the latter's home, he went to his own house and got the packages of cocaine which had been given him by Dispenza and took them to 167 Columbia Street, and there gave them to Frank Agnello to be taken to Alba's house. Frank Agnello testified on direct examination that he received the packages from Centorino but that he did not know their contents, and that he would not have carried them if he had known that they contained cocaine

or narcotics. On cross examination, he said that he had never seen narcotics. Then, notwithstanding objection by defendants, the prosecuting attorney produced the can of cocaine which the government claimed was seized in Agnello's bedroom and asked him whether he had ever seen it. He said he had not, and specifically stated he had never seen it in his house. In rebuttal, over objections of defendants, the government was permitted to put in the evidence of the search and seizure of the can of cocaine in Frank Agnello's room, which theretofore had been offered and excluded.

The case involves the questions whether search of the house of Frank Agnello and seizure of the cocaine there found, without a search warrant, violated the Fourth Amendment, and whether the admission of evidence of such search and seizure violated the Fifth Amendment. The Fourth Amendment is: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The provision of the Fifth Amendment invoked is this: "No person . . . shall be compelled in any criminal case to be a witness against himself."

The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted. See *Carroll v. United States*, 267 U. S. 132, 158; *Weeks v. United States*, 232 U. S. 383, 392. The legality of the arrests or of the searches and seizures made at the home of Alba is not questioned. Such searches and seizures naturally and usually appertain to and attend such arrests. But the right does not extend to other places. Frank Agnello's house was several blocks distant from Alba's house, where the arrest was made. When it was entered and searched, the conspiracy was ended and the defendants were under arrest and in custody elsewhere. That search cannot be sustained as an incident of the arrests. See *Silverthorne Lumber Co. v.*

*United States*, 251 U. S. 385, 391; *People v. Conway*, 225 Mich. 152; *Gamble v. Keyes*, 35 S. D. 645, 650.

Under the Harrison Act (§ 8; § 1 as amended by § 1006) it is unlawful for any person who has not registered and paid a special tax, to have cocaine in his possession, and all unstamped packages of such drug found in his possession are subject to forfeiture. We assume, as contended by the government, that defendants obtained from Frank Agnello's house the cocaine that was taken to Alba's house and there seized; that the can of cocaine which later was found in Agnello's house was unlawfully in his control and subject to seizure, and that it was a part of the cocaine which was the subject matter of the conspiracy.

The government cites *Carroll v. United States*, *supra*; but it does not support the search and seizure complained of. That case involved the legality of a search of an automobile and the seizure of intoxicating liquors being transported therein in violation of the National Prohibition Act. The search and seizure were made by prohibition agents without a warrant. After reference to various acts of Congress relating to the seizure of contraband goods, the court said (p. 153): "We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." It was held that, "The facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched." (p. 162.) And on that ground the court held the search and seizure without warrant justified.

While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a

lawful arrest therein. *Boyd v. United States*, 116 U. S. 616, 624, et seq., 630; *Weeks v. United States*, supra, 393; *Silverthorne Lumber Co. v. United States*, supra, 391; *Gould v. United States*, 255 U. S. 298, 308. The protection of the Fourth Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant. On the other hand, special limitations have been set about the obtaining of search warrants for that purpose. Thus, the National Prohibition Act, approved October 28, 1919, c. 85, Tit. II, § 25, 41 Stat. 305, 315, provides that no search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or is in part used for business purposes, such as store, shop, saloon, restaurant, hotel or boarding house. And later, to the end that government employees without a warrant shall not invade the homes of the people and violate the privacies of life, Congress made it a criminal offense, punishable by heavy penalties, for any officer, agent or employee of the United States engaged in the enforcement of any law to search a private dwelling house without a warrant directing such search. Act of November 23, 1921, c. 134, § 6, 42 Stat. 222, 223. Safeguards similar to the Fourth Amendment are deemed necessary and have been provided in the constitution or laws of every State of the Union.\* We think there is no state statute authorizing the search of a house without a warrant; and, in a number of state laws recently enacted for the enforcement of prohibition in respect of intoxicating liquors, there are provisions similar to those in § 25 of the National Prohibition Act. Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant. Absence of any judicial approval is persuasive authority that it is unlawful. See *Entick v. Carrington*, 19 Howard's State Trials, 1030, 1066. Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place

\*See p. 1268, Index Digest of State Constitutions (prepared for New York State Constitutional Convention Commission, 1915); also § 8, c. 7, Consolidated Laws, New York, as amended by L. 1923, c. 80.

without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause. See *Temperani v. United States*, 299 Fed. 365; *United States v. Rembert*, 284 Fed. 996, 1000; *Connelly v. United States*, 275 Fed. 509; *McClurg v. Brenton*, 123 Ia. 368, 372; *People v. Margolis*, 220 Mich. 431; *Childers v. Commonwealth*, 198 Ky. 848; *State v. Warfield*, 184 Wis. 56. The search of Frank Agnello's house and seizure of the can of cocaine violated the Fourth Amendment.

It is well settled that, when properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment. *Boyd v. United States*, *supra*, 630, *et seq.*; *Weeks v. United States*, *supra*, 398; *Silverthorne Lumber Co. v. United States*, *supra*, 391, 392; *Gould v. United States*, *supra*, 306; *Amos v. United States*, 255 U. S. 313, 316. The government contends that, even if the search and seizure were unlawful, the evidence was admissible because no application on behalf of defendant was made to the court for the return of the can of cocaine. The reason for such application, where required, is that the court will not pause in a criminal case to determine collateral issues as to how the evidence was obtained. See *Adams v. New York*, 192 U. S. 585, 594, affirming 176 N. Y. 351. But in this case, the facts disclosing that the search and seizure violated the Fourth Amendment were not in controversy. They were shown by the examination of the witness called to give the evidence. There was no search warrant; and from the first, the position of the government has been that none was necessary. In substance, Frank Agnello testified that he never had possession of the can of cocaine and never saw it until it was produced in court. There is nothing to show that, in advance of its offer in evidence, he knew that the government claimed it had searched his house and found cocaine there, or that the prosecutor intended to introduce evidence of any search or seizure. It would be unreasonable to hold that he was bound to apply for the return of an article which he maintained he never had. Where by uncontroverted facts, it appears that a search and seizure were made in violation of the Fourth Amendment, there is no reason why one whose rights have been so violated and who is sought to be incriminated by evidence so obtained, may not invoke protection of the

Fifth Amendment immediately and without any application for the return of the thing seized. "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right. *Gould v. United States, supra*, 313. And the contention that the evidence of the search and seizure was admissible in rebuttal is without merit. In his direct examination, Agnello was not asked and did not testify concerning the can of cocaine. In cross examination, in answer to a question permitted over his objection, he said he had never seen it. He did nothing to waive his constitutional protection or to justify cross examination in respect of the evidence claimed to have been obtained by the search. As said in *Silverthorne Lumber Co. v. United States, supra*, 392, "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." The admission of evidence obtained by the search and seizure was error and prejudicial to the substantial rights of Frank Agnello. The judgment against him must be set aside and a new trial awarded.

But the judgment against the other defendants may stand. The introduction of the evidence of the search and seizure did not transgress their constitutional rights. And it was not prejudicial error against them. The possession by Frank Agnello of the can of cocaine which was seized tended to show guilty knowledge and criminal intent on his part; but it was not submitted as attributable to the other defendants. During the summing up of the case to the jury by the prosecuting attorney, the court distinctly indicated that the evidence was admissible only against Frank Agnello. The other defendants did not request any instruction to the jury in reference to the matter, and they do not contend that any erroneous instruction was given. *Isaacs v. United States*, 159 U. S. 487, 491.

The packages of cocaine seized at Alba's house were carried to that place by Frank Agnello. He did this at the instance of Centorino; and in his behalf it is claimed he acted innocently and without knowledge of the contents of the package. The evidence of the search and seizure made in his house tended to show that he knew what he was doing and was a willing participant in the conspiracy charged. But so far as concerns the other defendants, it is immaterial whether he acted innocently and without knowledge of the contents of the package or knowingly to effect the object of

the conspiracy. In either case, his act would be equally chargeable to his codefendants. They are not entitled to a new trial. See *Rossi v. United States*, 278 Fed. 349, 354; *Belfi v. United States*, 259 Fed. 822, 828; *Feder et al. v. United States*, 257 Fed. 694; *Browne v. United States*, 145 Fed. 1, 13; *United States v. Cohn*, 128 Fed. 615, 626.

*Judgment against Frank Agnello reversed; judgment against other defendants affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*